Filed 7/27/20 In re B.C. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re B.C., a Person Coming Under the Juvenile Court Law.	
SONOMA COUNTY HUMAN SERVICES DEPARTMENT, Plaintiff and Respondent, v. B.C., Defendant and Appellant.	A155798; A157423 (Sonoma County Super. Ct. No. 5577DEP)

In this consolidated appeal, B.C. (Father) appeals from the orders of the juvenile court granting custody of his daughter, B.C., to her mother, F.S. (Mother), denying his petition to modify the disposition order, setting forth the terms of visitation, and terminating the dependency. During the proceedings, the juvenile court relieved Father's retained counsel due to a purported conflict of interest, and Father later pled no contest to the allegations of the dependency petition. On appeal, Father contends the court committed prejudicial error by failing to appoint new counsel or advise him of his right to appointed counsel, and by denying his modification request after

he made a prima facie showing that he was denied due process and his statutory right to appointed counsel. Father also contends the court erred in terminating jurisdiction because continuing supervision was necessary to ensure that visitation occurred as ordered. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Petition

On July 30, 2018, the Sonoma County Human Services Department (Department) filed an original petition under Welfare and Institutions Code section 300, subdivisions (a) and (b)(1),[1] on behalf of then 13-month-old B.C., alleging she suffered or was at substantial risk of suffering serious physical harm or illness nonaccidentally by her parent or as a result of the failure or inability of her parent to supervise or protect her adequately. The petition alleged that Father, who had full custody of B.C. at the time, could not provide an adequate explanation for "significant bruising" on the outside and inside of B.C.'s left thigh.

The petition further alleged that Mother had a history of domestic violence and substance abuse. In 2006, Mother was twice arrested and subsequently convicted of inflicting corporal injury on a spouse or cohabitant. In October 2014, Mother was allegedly arrested for driving while under the influence of alcohol and subsequently convicted of that crime and felony evading a peace officer causing injury/death, for which she was sentenced to two years in prison. In June 2017, Mother allegedly punched Father in the face while B.C. was present, and Mother was arrested for inflicting corporal injury of a spouse/cohabitant and violation of post-release community supervision. In May 2018, Mother and Father were allegedly involved in a

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

verbal argument that escalated into a physical altercation in which Mother purportedly threw coffee at Father's face in B.C.'s presence, leading to Mother's arrest for battery.

The petition further alleged Father had a history of domestic violence. He was arrested in February 2016 for battery on a spouse or cohabitant (not Mother), and in May 2016, was subject to a domestic violence restraining order.

In support of the petition, the Department provided a social worker's report stating that the "large bruises on both the inside and outside of [B.C.'s] left, upper thigh" were "suspicious for physical abuse" and "could have resulted from the child being grabbed by the leg while in the father's care." The bruises were discovered during a supervised visit between B.C. and Mother on July 22, 2018. Father told the visit supervisor he was unaware of any bruising and supposed the child had bruised her leg on a jungle gym or in the swimming pool. The Department made numerous attempts to make contact with Father, but he was unwilling to cooperate and appeared to be "actively avoiding the investigators." Consequently, a safety plan could not be developed. The report also noted that a social worker had entered Father's residence with a warrant while he was not home and noted that the apartment was "clean," "in good order," "well stocked with infant supplies," and had "[n]o safety hazards."

The Department further reported that Mother was an enrolled member of the Tolowa Nation in Oregon, and that she had two other children removed from her custody by the Tribal Court of the Tolowa Dee-Ni' Nation.

B. Detention Hearing

A contested detention hearing was held on August 1, 2018. Father was represented by retained counsel, Jennifer Ani.

Winifred Rogers testified that she was assigned to supervise Mother's visits in July 2018, and that she saw no bruising during a supervised visit on July 19, but noticed the bruising in question during the July 22 visit and took photographs. Rogers described a round bruise on the inside of B.C.'s left thigh and two long and thin faint bruises on the outside of the same leg, and Rogers testified in response to court questioning that the bruises "could be" from grabbing. However, Rogers had no reason to disbelieve Father's explanation that the bruises could have happened at the swimming pool or when B.C. rode a toy horse.

Social worker supervisor Sydney Berro testified that the Department filed the petition for B.C.'s safety because of the "very suspicious bruise on a child's inner thigh," Father's evasiveness, and the "indications of previous domestic violence or violence." Berro noted the Department's concern about the prior restraining order against Father, as well as Mother's criminal history and substance abuse. He further testified that although B.C. was not seen by a forensic child abuse expert, he believed the bruise represented a handprint due to its location and shape and the description provided by the visit supervisor. Based on his training and experience reviewing children with injuries, and knowing the common places children get injured, Berro testified that the bruise's location was a "suspicious place for a child to get injured," and that Father's explanations for the injury would likely have resulted in an injury to one side of the leg, but not both sides.

Father testified that he did not cause the bruise and believed B.C. got injured at the swimming pool or on a jungle gym.

The juvenile court concluded that "with no safety plan in place, unexplained injuries, and no likely cause [for] the injuries and the part of the body, that is an unusual part of a body to have an injury, the Court does find

that a prima facie case was established. [¶] Finding that a prima facie case has been established, I would really like a safety plan in place and the child back in dad's care. [¶] So, hopefully, sir, you'll work with the Department so we can get a safety plan, get your kid home. That's where the kid should be." The court set the matter for an updated status report on the safety plan progress and continued the case for a combined jurisdiction and disposition hearing later in the month.

C. Safety Plan Review

In a follow-up report, the Department recommended placement of B.C. with Mother. The report noted that in an interview after the detention hearing, Father could not identify any family he was in contact with or any friends who could be on a safety plan. As for Mother, the Department found there was no safety threat, as she had been attending a Drug Abuse Alternatives Center (DAAC) perinatal program and was living at a "YWCA Safe House" with 24-hour staffing. According to the DAAC coordinator, Mother had tested negative for substances since starting the program and was actively engaged in her recovery. The Department further reported that Indian Child Welfare Act (IWCA) representative Heather Lopez did not object to B.C.'s return to Mother and reported that Mother was doing well in recovery.

At the safety plan review hearing, the juvenile court heard directly from Lopez and B.C.'s counsel, both of whom supported releasing B.C. to Mother. Father's counsel, Ani, made a statement on his behalf, despite her stated belief that she had a conflict of interest. "[H]e's asked me to make a statement. He'd like to relinquish his rights to the child." Father then clarified, "my request was to have my rights terminated, Your Honor. I feel that—I agree with the Court. I feel like there's no way for me to prevent

bruises in the future since I didn't know how the last one happened. I don't feel like I could do it. [¶] I feel like our child is going to be in for a lifetime of court appearances, being taken from the home, false allegations. . . . I feel like I'm always going to be sitting here trying to prove something that didn't happen, which is a fallacy in itself. [¶] . . . . I feel like the Court and the family justice system has let my daughter down and hasn't protected my daughter and that—I feel like I have no way to prevent continued harm to her, I can't protect her, and I feel like—I feel like the Court has no decision but to terminate my rights as a parent."

The court explained to Father, "if your attorney says that your attorney has a conflict of interest and she can't ethically continue to represent you based upon that conflict, I would relieve her as your attorney. [¶] Based upon your stated position that you do want your parental rights terminated—I mean, you can just ride the course and see what the report comes out, see what you feel like at the next court proceeding, and we can pick up this conversation then." Father responded, "Your Honor, I feel like there's nothing I can do to alter the course of this and it's going to end up as my rights being terminated, and I just feel like why prolong the inevitable." Ani then stated, "That was not the advice that I provided to my client." The court relieved Ani as Father's counsel before concluding the hearing.

D. Jurisdiction and Disposition Report

Prior to the jurisdiction and disposition hearing, the Department filed a report recommending that the court sustain the allegations of an amended petition filed concurrently with the report,[2] and that Mother be ordered to

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[2] The amended petition "remove[d] concerns about [Mother's] substance abuse" because the Department concluded that "at this time," the abuse "is not related to why we are involved with [B.C.]"

participate in court family maintenance. The Department stated that Father was not entitled to reunification services if B.C. were placed with Mother under a plan of family maintenance.

The jurisdiction and disposition report contained the parents' relevant criminal[3] and social histories. The parents met in Oregon in 2016 when Mother was abusing alcohol and methamphetamine. She eventually left Father and continued in her addiction, but Father reported Mother to her probation officer, leading to her arrest. While in jail, Mother learned she was pregnant and, upon her release, completed a 28-day residential treatment program, followed by a three-month Intensive Outpatient Program (IOP). She also resumed her relationship with Father.

While Mother was in IOP, she and Father had a " 'huge fight' " while they were in a car. Mother, who was pregnant at the time, was trying to get out of the car when Father "slammed on the brakes," causing Mother to fall out and break her arm. She left Father for a month and lived with her family before the tribe placed her in transitional housing. Father moved to Santa Rosa and convinced Mother to come, and she later felt she made "a horrible decision" and it was " 'totally isolating.' " Mother claimed that Father was manipulative and controlling and that she became dependent on him.

Eight days after B.C. was born, the parents had another major clash. Mother slapped Father and went to jail, and an emergency protective order was issued restraining Mother from contact with Father. After the protective

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[3] In the section on Mother's criminal history, the report lists the same offenses alleged in the petition, with one notable difference. Instead of reporting convictions for driving under the influence and evading a police officer causing injury/death offenses occurring on "October 6, 2014," the report lists convictions for the same offenses occurring on "October 6, *2018*." As indicated in part A.4 of the Discussion, *post*, the October 6, 2018, date is a typographical error.

order expired, the parents reunited. However, a Child Protective Services report was made, and the parents participated in Voluntary Family Maintenance (VFM) from July 2017 through January 2018.

During VFM, Father was referred to individual therapy, and Mother was offered services including a referral for public health nursing, individual therapy, a psychological evaluation, and outpatient drug treatment in DAAC perinatal. Mother felt that she really started to work on herself during this period, taking medication to help with her moods, and participating in DAAC perinatal and therapy. She reported " 'walking on eggshells' " around Father, who told her " 'your feelings aren't real' " and tried to convince her that she was mentally ill. The VFM social worker concluded that Mother had completed everything asked of her and achieved the goals of her case plan, but Father never returned the worker's calls or followed through with referrals. DAAC perinatal reported that Mother was a good parent and made progress in courses in positive parenting, anger management, and behavioral skills. The public health nurse reported that Mother was attentive and thoughtful with B.C.

In May 2018, the parents had another fight in B.C.'s presence. According to Mother, Father was angry because she had used the " 'wrong kind of chicken' " in a salad. Tensions escalated in the car as the three drove to the YWCA. Mother asked Father to take her home, but he refused and began calling her names and demanding obedience. They pulled into the YWCA lot and Father again refused to take Mother home. Mother grabbed a cup with some leftover coffee in it and slammed it on the console, causing it to splash everywhere. Father called the police, who were unable to determine if a domestic violence incident occurred. Mother and B.C. stayed with a friend and then moved into the YWCA safe house.

In May and June 2018, the parents went to family law court with competing requests for custody of B.C. In early June 2018, Father obtained a restraining order protecting him and B.C. from Mother. In early July 2018, the parents met with a child custody recommending counselor, and Father, without Mother's permission, provided the counselor with a copy of Mother's psychological examination that was conducted during the VFM case and that claimed Mother was mentally unstable and could not take care of herself or B.C. The child custody counselor recommended that Father be given temporary full physical and legal custody of B.C., with supervised visits for Mother.

In late July 2018, emergency response social worker Heather Dukes interviewed Mother. Mother explained that she had previously provided all childcare to B.C. before Father gained custody, as Father usually wanted to relax when he got home from work. Mother was concerned about the bruising on B.C.'s thigh because of a third party's restraining order against Father. In this regard, a search of the California Law Enforcement Telecommunications System (CLETS) showed an active restraining order prohibiting Father from contacting his ex-girlfriend. Father reportedly grabbed the ex-girlfriend by the arms, threw her up against a wall, threatened to " 'kill you if you leave me' " and told her she was a "slut" and should be "conserved." Photographs with the restraining order showed significant bruising on the victim. Mother saw the photographs and was concerned how Father might handle anger or frustration with B.C.

In early August 2018, Berro and Dukes met with Father to discuss the injury to B.C. and to develop a safety plan. Father brought pictures of B.C. playing on a large wooden structure. When Berro asked how the bruises could have occurred on both sides of her leg, Father became upset, grabbed

the photographs, and stared at Berro before complaining that the Department "already had their minds made up." When asked about the restraining order, Father claimed his ex-girlfriend was mentally unstable and had pinched herself and then falsely accused him of domestic violence.[4] Asked if he had any other criminal history, Father said he was arrested in Oregon for beating up a " 'peeping Tom' " who was spying on him and his wife. Berro concluded a safety plan was not possible because Father was not being honest about his prior criminal history, became agitated with standard follow-up questions, and demonstrated an inability to work with the Department to ensure B.C.'s safety.

On August 23, 2018, a social worker spoke with Father regarding his statement at the safety plan review hearing that he wanted to relinquish his parental rights. Father said, " 'Unless you can say, "We understand [Mother's] paranoid delusions, we get that false allegations have been made, we get that kids fall and get hurt." Unless you can do that, then I need to be free of this.' " He stated that he wanted " 'either full physical and legal custody to me, full physical and legal custody to [Mother], or eliminate us both and give B.C. to another loving family' " and that he was unwilling to participate in any plan involving both parents.

The Department confirmed it was safe to return B.C. to Mother's care because Mother was doing well with her recovery and was participating in services and receiving support. The Department assessed that placement in Mother's custody was in B.C.'s best interests. As for Father, the Department was willing to coordinate supervised visits between him and B.C., but no visits had yet been initiated because Father had declined them. The

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[4] The report noted that Dukes had reviewed the police report, which indicated that the injuries to the victim were significant.

Department reported the following statement by Father: " 'You've stolen my child, you've put me on the brink of homelessness, and now you're saying I need an attorney and give out more money?' " The Department indicated that if Father wished to re-enter his daughter's life, it would arrange for him to have supervised visits with a plan for no contact with Mother, but before any unsupervised time, Father should first participate in a psychological evaluation and begin attending groups at Nonviolent Alternatives (NOVA).

The Department explained that the bruising on B.C.'s thigh was its greatest cause for concern because Father was unable to provide an adequate explanation for it. "The inner thigh is a place on a toddler's body that is not consistent with accidental injury. Further, a singular circular bruise to the inner thigh with parallel bruises on the outer thigh are consistent with bruising that would occur when an adult grabs a toddler by the leg." These factors, combined with Father's evasiveness during the investigation, aggressive, intimidating and controlling behaviors, criminal background, and unwillingness to stay engaged in B.C.'s life during the investigation, "creates a situation where the Department has ultimately assessed that the bruising to [B.C.'s] inner and outer thigh are most likely non-accidental." Although the Department recognized that both parents were perpetrators of domestic violence, Father engaged "in more subtle forms of abuse, including mental, emotional, and coercive and controlling behavior." The Department further concluded that Father had "misused" Mother's psychological evaluation from the VFM case to gain custody of B.C. through the family law court.

E. Jurisdiction and Disposition Hearing

Father appeared in pro per at the September 5, 2018, jurisdiction and disposition hearing. Mother's counsel informed the court that in the family law case, the court had found that Mother did not throw coffee in Father's

face or perpetrate domestic violence against him, and the restraining order was dismissed.

The court interrupted Father's opening remarks to explain that the purpose of the hearing was to determine whether there were grounds for jurisdiction, and if so, what should be done at disposition. Father replied, "Without legal representation, Your Honor, I don't understand what would happen with one option versus the other." After the court explained that Father could agree with the Department's recommendation or seek a contested hearing, Father said that Mother was "always going to be making false allegations against me" and "has forced me into a position where I can't afford to legally defend myself against her conspiracies and allegations and delusions." Father further stated that he was "not in a position to fight. I will lose my job for continuing to show up, being [dragged] into court." The court told Father he could plead no contest, which would not admit the truth of the charges but indicate he would not fight them. The court further explained Father's rights, including his right to have a contested hearing "where you can represent yourself or you could hire an attorney," call witnesses, and present a defense. Father responded, "I can't fight . . . I'm not admitting that they're true and I can't fight the case." The court replied, "So that's a no contest plea then?" Father replied, "Yes, Your Honor."

The court then adopted the findings and orders that B.C. was a dependent of the juvenile court under the supervision of the Department in the home of Mother; that clear and convincing evidence supported B.C.'s removal from Father's home because of the substantial danger to her physical health, safety, protection or physical or emotional well-being and the absence of reasonable means by which her physical health could be protected without removal; that continuance in Father's home was contrary to her welfare; and

that B.C.'s placement with Mother would not be detrimental to the child's safety, protection, physical or emotional well-being and would be in her best interests. The court also ordered Mother to comply with her case plan.

Father filed a timely notice of appeal from the September 5 disposition order (case no. A155798).

F. Six-Month Review

In its three-month update to the court,[5] the Department reported that Mother was on a waitlist to begin sixteen weeks of domestic violence groups at the YWCA. The Department further reported that Mother continued to live in a clean and sober living environment, submitted to random drug testing, created a relapse prevention plan, met weekly with her sponsor, attended Narcotics Anonymous, attended therapy twice a month and was demonstrating good insight and taking more effective psychotropic medication. Mother wished to move to Oregon where she could more affordably reside with her mother and be closer to the tribe. Father had not requested visitation with B.C.

On February 20, 2019, Father filed a request to change court order (§ 388) in which he requested assignment of a new judge and for the matter to be "moved to federal court." Father argued that he wanted the matter "to go back to the way it was" prior to the Department's "interference" with his sole physical and legal custody of B.C. Father denied committing any neglect

[5] We hereby grant Father's motion to augment the record with the three-month status review report, dated February 22, 2019, and Father's notice of appeal in case no. A157423, dated May 30, 2019.

or abuse of B.C. and accused the Department of conducting incomplete investigations.[6]

Prior to the six-month review hearing, the Department submitted a status review report on Mother's overall progress. In February 2019, Mother was forced to leave a sober living environment after she engaged in a verbal dispute with another resident, but she maintained employment and continued to participate in the services in her case plan. She did not engage in any incidents of domestic violence during the review period and completed substance abuse treatment at DAAC. She continued to meet with her therapist and sponsor and attend Narcotics Anonymous meetings. She also complied with testing and tested negative for all substances. B.C. was in a safe home and was developmentally on track, with no concerning behaviors indicating emotional or mental health issues.

The Department further reported that Father was uninvolved during the review period, and though he was offered services through B.C.'s case plan (i.e., a psychological assessment and a 52-week anger management program), he did not participate in those services or others on his own. Nor did he inquire about B.C.'s well-being, other than requesting supervised visitation after the three-month update. The Department recommended that the court dismiss the matter with full physical and legal custody granted to Mother. The tribe supported the recommendation.

At the February 27, 2019, six-month review hearing, Father told the court he felt he was coerced into his no contest plea. After an off-record discussion, the court went back on the record and noted that Father had "made a request for court-appointed counsel." The court proceeded to ask

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[6] We are not aware of the juvenile court's ruling on Father's February 20, 2019, section 388 request, and in any event, Father does not appear to raise any claim of error related to it.

Father about his financial situation and determined that he was entitled to court-appointed counsel. The court then appointed counsel to represent Father and continued the matter for a contested hearing.

On April 2, 2019, Father filed another section 388 request, seeking to withdraw his no contest plea and requesting a new jurisdiction and disposition hearing. Father stated: "On 9/5/18 I plead 'no contest' to the jurisdictional and dispositional hearings. My attorney had quit, I couldn't afford my own attorney, I didn't understand the consequences of my plea, and my plea wasn't knowing and intelligent, and therefore violated due process. As a result of this plea, my child was taken from me, the custodial parent, I have not had an opportunity to reunify, and my right to appeal these decisions has been limited."

On May 16, 2019, Father filed another section 388 request attaching what appeared to be a court document captioned for the United States District Court of Northern California and entitled "Declaration of Support for Injunctive Relief and/or Monetary Award and Award for Punitive Damages." In this document, Father extensively detailed his relationship with Mother and accused her of "put[ting] together a complex scheme to kidnap and conceal B.C." with the help of individuals from the DAAC program, the Sonoma County Children and Family Services Program, and the juvenile court. He further accused social workers of colluding in the "kidnapping" of B.C. and making false allegations against him in violation of his civil rights.

At the contested hearing on May 17, 2019, the court first addressed Father's April 2 modification request seeking withdrawal of his no contest plea. The court found that "the threshold showing [of changed circumstances] has not been made and denie[d] a hearing on that issue." The

court also summarily denied Father's May 16 section 388 request for failing to allege changed circumstances.

After hearing opening statements, Father's testimony, and closing arguments, the court found there was insufficient evidence that Mother has not ameliorated the problems and said the court "cannot continue on with family maintenance as there's nothing more for the mother to work on at the time." The court indicated it would dismiss the case, but first asked about the final judgment exit custody order. Initially, counsel for the Department, B.C., and Mother supported no visitation rights for Father due to his failure to complete any of the services that were offered. Father requested unsupervised visitation to take place near the child's residence in Oregon and said he would make the effort to travel there.

Father was then called to testify about his request for unsupervised visitation. He testified he had not been parenting a child from a previous relationship because he was in a financially "disastrous" position and thought it was in the child's best interest to be adopted by the mother's fiancée. After hearing further testimony and discussions with counsel, the court determined that Father should play a meaningful role in B.C.'s life, but required therapy for his anger and emotional issues. The court and the parties ultimately agreed that Father would participate in professionally supervised visitation with B.C. once a month for two hours, with at least one month between visits, in the area closest to where she and Mother resided in Oregon. Father would be responsible for all costs for the supervised visits and would have to check in and pay for the visits two weeks in advance, and the duration of the visits would increase to four hours per month after three months of successfully completed supervised visits. The court also recommended that Father take a parenting class. When asked by the court if there was anything to augment

or clarify, Father's counsel responded, "I think that summarizes our agreement." The court concluded the hearing, stating, "So we have an agreement here today. We're going to reduce that to writing. We will circulate that. I will sign it, and we'll hopefully be able to vacate the next court date." On May 30, 2019, the court signed the exit custody orders and signed the final judgment dismissing the case.

Father filed a timely notice of appeal from the orders denying his section 388 requests, dismissing the dependency, and granting custody to Mother (case no. A157423).

DISCUSSION

A. Appointed Counsel in Dependency Cases

Father contends he was denied his right to appointed counsel when the juvenile court, after relieving his retained counsel over his objection, failed to advise Father that he had a right to appointed counsel. The error was prejudicial, he maintains, because appointed counsel could have advised him that the evidence was insufficient to support the juvenile court's jurisdiction findings and disposition; that it was not in B.C.'s best interests to be placed with Mother because of her history of substance abuse and domestic violence; and that the court had discretion to order reunification services. We conclude that any error by the juvenile court regarding Father's right to appointed counsel was harmless.

1. Governing Law for Appointment of Counsel

Section 317 governs the appointment of counsel in dependency proceedings. Subdivision (a)(1) of section 317 provides for discretionary appointment of counsel "[w]hen it appears to the court that a parent or guardian of the child desires counsel but is presently financially unable to afford and cannot for that reason employ counsel."

Section 317, subdivision (a)(2), applies "in an Indian child custody proceeding" and states that when it appears that a parent or Indian custodian desires counsel but is presently unable to afford it, "the provisions of Section 1912(b) of Title 25 of the United States Code and Section 23.13 of Title 25 of the Code of Federal Regulations shall apply."[7] Section 1912(b) of Title 25 of the United States Code provides in relevant part that "[i]n any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding."

Section 317, subdivision (b), mandates appointment of counsel in certain dependency cases involving "out-of-home" placements. Specifically, "[w]hen it appears to the court that a parent or guardian of the child is presently financially unable to afford and cannot for that reason employ counsel, and the child has been placed in out-of-home care, or the petitioning agency is recommending that the child be placed in out-of-home care, the court shall appoint counsel for the parent or guardian, unless the court finds that the parent or guardian has made a knowing and intelligent waiver of counsel as provided in this section." (§ 317, subd. (b); see Cal. Rules of Court, rule 5.534(d)(1)(B).)

The parties dispute whether Father met the threshold requirements for mandatory appointment of counsel under section 317, subdivisions (a)(2) and (b). The Department contends Father did not appear to be indigent, as he was represented by retained counsel at the contested detention hearing, and he did not indicate he was indigent and in need of appointed counsel until the six-month review hearing (at which time counsel was appointed). The

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[7] Code of Federal Regulations, title 25, section 23.13 governs the payment of appointed counsel in involuntary Indian child custody proceedings in state courts.

Department further contends that section 317, subdivisions (a)(2) and (b), did not apply because the proceedings at issue did not involve an "out-of-home" placement or "removal" of B.C.

Father contends the juvenile court should have known of his need for appointed counsel because he objected to the withdrawal of his retained counsel and expressed his inability to comprehend the proceedings, he was quoted in the Department's jurisdiction and disposition report as saying he was on the "brink of homelessness," and he explicitly told the juvenile court at the jurisdiction and disposition hearing that he could not "afford to legally defend" himself. Father additionally contends the juvenile court failed to advise him of his right to appointed counsel at all relevant hearings as required by California Rules of Court, rule 5.534(c), and failed to adequately ascertain whether he knowingly and voluntarily waived his right to counsel after explaining the dangers and disadvantages of self-representation.

We need not decide whether the threshold requirements for mandatory appointment of counsel were met. Even if we assume the juvenile court erred in failing to appoint counsel or advise Father of his statutory right to appointed counsel, Father must still show the error was prejudicial—i.e., that there is reasonable probability of a more favorable result absent the error. (*In re J.P.* (2017) 15 Cal.App.5th 789, 797 (*J.P.*).) For the reasons below, we conclude any error was harmless.

2. Substantial Evidence in Support of Jurisdiction

Father contends appointed counsel would have demonstrated there was insufficient evidence to support the jurisdiction findings that B.C. was a child within the meaning of section 300, subdivisions (a) and (b)(1). We disagree and conclude it is not reasonably probable that appointment of counsel would have changed such findings.

We review the juvenile court's jurisdiction findings for substantial evidence. (*In re Henry V.* (2004) 119 Cal.App.4th 522, 529 (*Henry V.*).) In doing so, we do not pass on the credibility of witnesses, resolve conflicts in the evidence, or re-weigh the evidence, and we view the record in favor of the juvenile court's order and affirm even if other evidence supports a contrary finding. (*In re T.W.* (2013) 214 Cal.App.4th 1154, 1161–1162 (*T.W.*).) "The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the findings or order." (*Id.* at p. 1162.)

Substantial evidence supported the court's findings that B.C. was a child who had suffered or was at substantial risk of suffering serious physical harm inflicted nonaccidentally by Father and/or as a result of his failure or inability to adequate supervise or protect her. (§ 300, subds. (a), (b)(1).) The seriousness and nonaccidental nature of B.C.'s injury was supported by the photographs and testimony of social workers, the "unusual" location of the bruise on both sides of B.C.'s thigh (indicating she was grabbed), Father's inability to provide a full and adequate explanation for the injury, and his evasiveness and unwillingness to cooperate in the Department's investigation. The court implicitly found the Department's evidence and testimony credible on this score, and we defer to its findings. (*T.W.*, *supra*, 214 Cal.App.4th at pp. 1161–1162.)

The evidence of Father's criminal and domestic violence history further supported the inference that Father was prone to anger and physicality that placed B.C. at substantial risk of serious physical harm. (*In re N.M.* (2011) 197 Cal.App.4th 159, 165–166 (*N.M.*) [court may consider past events in deciding jurisdiction].) As explained in the jurisdiction and disposition report, Father was arrested for beating up a "peeping Tom," and was arrested

in 2016 for battery and was subject to an active restraining order after his ex-girlfriend claimed he grabbed and bruised her arms.

Father dismisses the domestic violence allegations in the jurisdiction and disposition report as hearsay and argues that competent counsel would have objected and provided testimony from Father to counter them. But section 355, subdivision (b), provides that hearsay evidence in a social study[8] prepared by the petitioning agency is admissible and constitutes competent evidence upon which a finding of jurisdiction may be based, "to the extent allowed by subdivisions (c) and (d)." As relevant here, subdivision (c)(1) of section 355 specifies that any properly objected-to hearsay evidence in a social study "shall not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based" unless certain exceptions apply.[9] Here, however, Father did not deny he was arrested for battery or subject to a restraining order protecting his ex-girlfriend, and the record contains copies of the restraining order itself as well as photographs of the victim's bruising.[10] Because the domestic violence allegation in the Department's jurisdiction and disposition report was neither uncorroborated hearsay nor the exclusive basis for the court's jurisdiction, it

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[8] The jurisdiction and disposition report falls within the definition of "social study," which "means any written report furnished to the juvenile court and to all parties or their counsel by the county probation or welfare department in any matter involving the custody, status, or welfare of a minor in a dependency proceeding . . . ." (§ 355, subd. (b)(1).)

[9] We do not reach whether any of the exceptions under section 355, subdivision (c)(1)(A)–(D) might apply, as neither party addresses the issue.

[10] Indeed, Father does not even deny the existence of bruising on his ex-girlfriend's arm. Instead he claims she caused it herself and falsely accused him. We assume the juvenile court found the ex-girlfriend's account more credible and defer to that implied finding. (*T.W.*, *supra*, 214 Cal.App.4th at pp. 1161–1162.)

was appropriately considered by the juvenile court in support of its jurisdiction findings. (§ 355, subds. (b), (c)(1).)

3. Substantial Evidence in Support of Disposition

Father contends appointed counsel could have advised him that there was no clear and convincing evidence justifying B.C.'s removal because there was no evidence that Father caused her bruising, and a single isolated incident is insufficient to warrant removal. We again conclude substantial evidence supported the juvenile court's order.

A dependent child shall not be taken from the physical custody of his or her parents unless the juvenile court finds clear and convincing evidence of a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child for the parent to live with the child or otherwise exercise the parent's right to physical custody, and there are no reasonable means by which the child's physical and emotional health can be protected without removing the child from the parent's physical custody. (§ 361, subd. (d).) The court must make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal and must state the facts on which a removal decision was based. (*Id.*, subd. (e).)

" 'Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt.' " (*In re A.E.* (2014) 228 Cal.App.4th 820, 825 (*A.E.*).) This is a heightened standard of proof that reflects the presumptive constitutional right of parents to care for their children, and the standard of review from a disposition order is the substantial evidence test, " 'bearing in mind the heightened burden of proof.' " (*Id.* at p. 826.) Evidence of past abuse, standing alone, does not meet the clear and convincing standard of proof required to justify a child's removal

from the parent's physical custody, as there must be some reason to believe the acts may continue in the future. (*Ibid.*) But jurisdiction findings are prima facie evidence the child cannot safely remain in the home (§ 361, subd. (c)(1)), and "[t]he parent need not be dangerous and the child need not have been actually harmed before removal is appropriate." (*A.E.*, at pp. 825–826.) " 'The focus of the statute is on averting harm to the child.' " (*N.M.*, *supra*, 197 Cal.App.4th at p. 170.)

The disposition order was supported by clear and convincing evidence that removal was necessary to avert harm to B.C.'s physical and emotional well-being. First, the court could reasonably rely on the jurisdiction findings as prima facie evidence in support of removal. (§ 361, subd. (c)(1).) The evidence demonstrated not only that B.C. suffered significant and atypical bruising during the brief period of time she was in Father's sole custody, but that Father was previously arrested for violent behavior and was subject to an active restraining order based on allegations of domestic violence resulting in bruising. The court could also reasonably take into account B.C.'s young age and vulnerability, Father's inability to craft a safety plan, the evidence of Father's history of anger and aggression towards Mother and his ex-girlfriend, and the fact that Father did not notice or seek medical care for B.C.'s injury until others discovered it and then immediately refused to cooperate with Department investigators. These circumstances distinguish *A.E.*, relied upon by Father, which involved what the court found was an isolated incident unlikely to recur, and a parent who expressed remorse and a commitment to learning better discipline methods. (*A.E.*, *supra*, 228 Cal.App.4th at p. 826.) Father, in contrast, showed no willingness to take responsibility for the unexplained and significant bruise suffered by his young child while under his sole custody and care.

Father argues the juvenile court failed to determine whether reasonable efforts were made to prevent the need for removal. (§ 361, subd. (e).) While appointed counsel could have requested that the court employ less drastic alternatives including unannounced visits and in-home bonding and counseling services (*In re Ashly F.* (2014) 225 Cal.App.4th 803, 810 (*Ashly F.*); *Henry V.*, *supra*, 119 Cal.App.4th at p. 529), such advocacy could not have erased the record of Father's conduct before and during the proceedings, which demonstrated the futility of offering him such services. Father was referred to individual therapy during the VFM case, but he declined. Throughout the Department's investigation, he showed unwillingness to cooperate with the Department and to stay engaged in B.C.'s life. At the conclusion of the detention hearing, the court expressly indicated its desire for "a safety plan in place and the child back in dad's care," and the Department undertook to craft a safety plan, but Father could not identify family or friends to be on it. Two days later, at the safety plan review hearing, Father suddenly appeared to give up entirely on maintaining custody over B.C. and asked the court to relinquish his parental rights. Then later he told a social worker he did not want to be involved in B.C.'s life if Mother was involved. At no point did Father express any remorse or willingness to change or learn from the circumstances that led to the dependency. (Cf. *Ashly F.*, *supra*, at p. 810 [finding reasonable means to protect children in home where mother expressed remorse and enrolled in parenting class].) On this record and under these circumstances, substantial evidence meeting the clear and convincing standard of proof supported the court's findings that the Department undertook reasonable efforts to keep B.C. in Father's home, but that there were no reasonable means by which

B.C.'s physical and emotional health could be protected without removing her from Father's home. (§ 361, subds. (d), (e).)

4. Best Interests of the Child

We also find no merit in Father's contention that had counsel been appointed, he could have demonstrated that B.C.'s placement with Mother was not in the child's best interests.

"When making a custody determination in any dependency case, the court's focus and primary consideration must always be the best interests of the child." (*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 268.) Under section 361.2, subdivision (a), if the juvenile court orders removal of a child pursuant to section 361, the court must determine whether there is a parent with whom the child was not residing at the time that the events or conditions arose leading to the dependency who desires to assume custody. "If such a parent exists—referred to as the 'noncustodial parent'—the court is then required to place the child with that parent unless it finds that doing so would be detrimental to the physical or emotional well-being of the child." (*In re Maya L.* (2014) 232 Cal.App.4th 81, 97–98.) The party opposing placement has the "burden to show by clear and convincing evidence that the child will be harmed if the noncustodial parent is given custody." (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1243.)

The record contains ample evidence that Mother, as the noncustodial parent, provided good care for B.C. and had made significant and sustained progress on her case plan and recovery from substance abuse in order to give B.C. a safe home. She maintained employment, participated in the services in her case plan, completed substance abuse treatment and tested negative for all substances, did not engage in any incidents of domestic violence during

the review period, and made good progress in therapy. B.C.'s counsel and the tribe's representative agreed that B.C. should be placed with Mother.

In arguing that appointed counsel could have shown that placement with Mother was detrimental to B.C., Father mostly recounts events during Mother's criminal and social history that were already before the juvenile court from the Department's reports. We see no reasonable probability of a more favorable result for Father had the same evidence been submitted by appointed counsel, particularly in light of Mother's demonstrated progress during the review period.

Father also contends appointed counsel could have argued that Mother had not met the goals of her case plan or benefitted from her services because she had a more "recent" arrest for driving under the influence and evading a police officer in or around October 26, *2018*. But the evidence Father relies upon is an obvious typographical error in the Department's jurisdiction and disposition report, which was filed in August 2018, nearly two months before the incident it purports to describe. As the record shows that Mother committed these same offenses on or about October 6, *2014*, it appears the report simply misstated the year.[11] The court already knew about the October 2014 offenses, and the record shows that Mother completed substance abuse treatment and consistently maintained sobriety thereafter.

For these reasons, we conclude Father fails to demonstrate that appointment of counsel would have helped him carry his burden of showing by clear and convincing evidence that B.C. would be harmed if left in Mother's custody.

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[11] The Department's February 2019 status review report made no mention of an October 2018 arrest.

5. Denial of Reunification Services

Father contends appointed counsel could have advocated for him to receive family reunification services. We conclude it is not reasonably probable that the appointment of counsel would have led to a more favorable result for Father with regard to the juvenile court's denial of reunification services.

When a juvenile court places a dependent child with the noncustodial parent subject to the supervision of the juvenile court, "the court may order that reunification services be provided to the parent or guardian from whom the child is being removed, or the court may order that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court supervision, or that services be provided to both parents, in which case the court shall determine, at review hearings held pursuant to Section 366, which parent, if either, shall have custody of the child." (§ 361.2, subd. (b)(3).) This discretion conferred on the juvenile court by section 361.2, subdivision (b)(3), serves the Legislature's goal of facilitating a safe and stable permanent home for the child. (*In re Erika W.* (1994) 28 Cal.App.4th 470, 476.) A juvenile court's decision to deny reunification services to one parent and grant the other parent full legal and physical custody is reviewed for abuse of discretion. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1179.) The test for abuse of discretion is whether the court exceeded the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318–319 (*Stephanie M.*).)

The juvenile court did not abuse its discretion in denying reunification services to Father. Beyond the jurisdiction findings and Father's failure to develop a safety plan, Father had expressed his unwillingness to be involved in B.C.'s life if Mother was involved and indicated his refusal to participate in

supervised visits with B.C. In contrast, Mother showed sustained progress in her case plan and recovery. As the court's paramount concern was facilitating a stable and permanent home for B.C., it was not outside the bounds of reason for the court to determine, in light of Father's erratic and uncooperative behavior throughout these proceedings, that the best course of action was to provide maintenance services solely to Mother in order to eventually allow her to retain custody without court supervision.

For all of these reasons, we conclude the juvenile court did not prejudicially err in failing to appoint counsel or advise Father of his right to appointed counsel.

B. Request for Modification

Father contends he was denied due process when the juvenile court denied his April 2 modification request seeking withdrawal of his no contest plea and a new jurisdiction and disposition hearing. Father argues that a section 388 request is an appropriate method for raising a due process challenge based on lack of notice (*In re D.R.* (2019) 39 Cal.App.5th 583, 590), and that here, he was denied due process when the juvenile court failed to appoint counsel or advise him of his right to appointed counsel, resulting in his pleading no contest without fully understanding the consequences of the plea.

Under section 388, the juvenile court may modify an order if a parent shows, by a preponderance of the evidence, that changed circumstances or new evidence exists, and that modification would promote the child's best interests. (§ 388; Cal. Rules of Court, rule 5.570(e); *In re Amber M.* (2002) 103 Cal.App.4th 681, 685.) " '[S]ection 388 contemplates that a petitioner make a prima facie showing of both elements to trigger an evidentiary hearing on the petition.' [Citation.] The statutory language 'makes clear

that the hearing is only to be held if it appears that the best interests of the child may be promoted by the proposed change of order.' " (*In re Justice P.* (2004) 123 Cal.App.4th 181, 191.)

We conclude the request was properly denied without an evidentiary hearing because Father did not make a prima facie showing of changed circumstances or new evidence. Father did not demonstrate that he could develop a safety plan or that he had participated in and made meaningful progress in any of the services recommended by the Department (i.e., psychological evaluation, NOVA, anger management). Nor did Father make a prima facie showing that modification of the disposition would be in B.C.'s best interests. In his request, Father offered only a perfunctory statement that "[i]t would be better for my child to have my due process rights served, giving me the opportunity to advocate for her best interest." Throughout the proceedings however, B.C. was represented by her own counsel, who did not object to B.C.'s placement with Mother and agreed that Father's modification request should be denied. Moreover, "a primary consideration in determining the child's best interests is the goal of assuring stability and continuity." (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) Father's request sought an entirely new jurisdiction and disposition hearing. Given B.C.'s young age and the lack of changed circumstances, it was not in her best interests to further delay and threaten the stability and continuity of her placement with Mother. The modification request was properly denied.

C. Visitation Order and Termination of Jurisdiction

Father contends the juvenile court abused its discretion when it allowed B.C. and Mother to move to Oregon and made extensive exit orders without retaining jurisdiction to ensure that visitation occurred as ordered and that Father had the financial resources to comply with the plan.

We review the juvenile court's decisions to terminate dependency jurisdiction and to issue custody (or "exit") orders for abuse of discretion. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 318.) If a child has not been removed from the physical custody of his or her parent, the court must schedule a review hearing pursuant to section 364 to be held within six months of the date of the declaration of dependency and every six months thereafter to determine "whether continued supervision is necessary." (§ 364, subds. (a), (c), (d).) Section 364, subdivision (c), requires the court to "terminate its jurisdiction unless the social worker or his or her department establishes by a preponderance of evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn." (See also § 364, subd. (d).)

Here, the juvenile court acted within its discretion in concluding that continued supervision was not necessary, as the Department's reports showed Mother's sustained progress to address the conditions that required the court's initial assumption of jurisdiction. Father's arguments to the contrary are without merit. He submits that "Mother was still having issues with her ability to get along with others" (citing her forced exit from the sober living program) and that her "therapy was infrequent." But despite Mother's program exit due to a "verbal" dispute that violated the rules of the home, the record shows that Mother did not engage in any further incidents of domestic violence or substance abuse—the conditions that led to the initial assumption of jurisdiction. And as the Department explained, the "infrequen[cy]" of Mother's therapy sessions was due to her inflexible work schedule. Her therapist otherwise reported that she consistently attended her scheduled sessions and demonstrated good insight.

As for the visitation order, the Department argues that Father forfeited this challenge on appeal by failing to raise any objection in the proceedings below. We agree. (See generally *In re Dakota H.* (2005) 132 Cal.App.4th 212, 221–222 [forfeiture rule applies in dependency litigation].) As recounted above, Father's counsel told the court at May 17, 2019, contested hearing that the terms of visitation set forth by the court adequately "summarize[d] our agreement." Since Father agreed to the visitation order, he forfeited his right to object to the order for the first time on appeal. (*Ibid.*)

DISPOSITION

The judgment is affirmed.

FUJISAKI, J.

We concur.

SIGGINS, P.J.

PETROU, J.

(A155798, A157423)